

## MEMORANDUM

TO: MASSACHUSETTS PUBLIC PROCUREMENT OFFICIALS

FROM: Gordon Sainsbury, AIA; RIBA  
Executive Director, Designer Selection Board

DATE: April 11, 2005

RE: ALERT REGARDING IMPORTANT NEW REQUIRED  
APPLICATION FORMS FOR DESIGNER SERVICES ON PUBLIC  
CONSTRUCTION IN THE COMMONWEALTH

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This memorandum is to advise you that Section 5 of Chapter 193 of the Acts of 2004 entitled "An Act Further Regulating Public Construction in the Commonwealth" amended M. G. L. c. 7, §38K and mandates that the Designer Selection Board ("DSB") issue a new application form for use by all Municipalities and all other Public Agencies not within the DSB's jurisdiction in the selection of designers for public construction projects in the Commonwealth.

In compliance with this requirement, the DSB has developed a new application form to be used in your city or town effective, Monday, April 18, 2005. This form may be accessed electronically on the website of the Division of Capital Asset Management at [www.mass.gov/cam/DSB/fi\\_dselectboard\\_ct.html](http://www.mass.gov/cam/DSB/fi_dselectboard_ct.html).

The form is named **Standard Designer Application Form for Municipalities and Public Agencies not within DSB Jurisdiction 2005**.

The application form will also be posted in the Boston Society of Architects monthly Chapter Letter and the BSA weekly Currents for the benefit of all professional individuals/firms who are likely to apply for projects through the above bodies. It will also be posted on the websites for the Massachusetts Municipal Association at [www.mma.org](http://www.mma.org) and the City Solicitor and Town Counsel Association at [www.massmunilaw.org](http://www.massmunilaw.org).

In addition, for information purposes, we will have hard copy included in the next addition of the Central Register.

Should you require help in finding the forms on the web please do not hesitate to contact me.

Attachment

May 9, 2006

Please find enclosed the latest "Designer Selection Board Guidelines for Cities and Towns".

These guidelines are a re-issue of those found in the Inspector General's document "Designing and Construction Public Facilities" rev. 1998.

The major difference is in the "Instruction for the Calculation of Designer Fees" (recommended fees by Building Type and amount) and the update of the payroll cost. (see question 4).

I hope this will aid you in your deliberations and if you have any questions please call me at the above number.

Yours sincerely,

Gordon P. Sainsbury, AIA; RIBA  
Executive Director  
Designer Selection Board

GPS/cgh

Enclosures

TO: Cities and Towns

FROM: Gordon P. Sainsbury, AIA; RIBA  
Executive Director  
Designer Selection Board

SUBJECT: Designer Selection Board Guidelines for a City and Town Building Project

DATE: May 9, 2006

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**It is the intention of this memorandum to briefly explain the relationship between local authorities and the State Designer Selection Board and to provide local authorities with answers to a number of common and recurring questions regarding the proper application of designer selection statutes and procedures to the planning and design of local building projects.**

**Local authorities should be thoroughly familiar with the following provision of Chapter 7, Section 38K (a) of the General Laws:**

*“Every contract for design services for any building construction, reconstruction, alteration, remodeling, or repair estimated to exceed one hundred thousand dollars (\$100,000) by any city, town or agency, board, commission, authority or instrumentality thereof, other than housing authorities shall be awarded only after a selection procedure adopted in writing, prior to publication requesting applications, complying with the purposes and intent of sections thirty-eight A1/2 to thirty-eight O, inclusive, and the following requirements.”*

The remainder of Section 38K (a) explains the specific minimum procedural requirements that must be satisfied to properly obtain proposals from designers. The State Designer Selection Board is responsible for publishing guidelines to assist public agencies not within the Board's direct jurisdiction (cities and towns) in the establishment of a professional and independent designer selection procedure consistent with the provisions and intent of the State designer selection statutes.

To carry out this advisory role, the State Designer Selection Board has issued the enclosed guidelines. They are revised as necessary, to all cities and towns. **This issue updates the most recent issues (October 1, 1994).**

If you have any questions, please contact this office or our internet address at [www.mass.gov/cam](http://www.mass.gov/cam)  
You may also contact the Inspector General's Office for additional information at One Ashburton Place, Room 1311, Boston, MA 02108, (617) 727-9140, Internet address is [www.mass.gov/ig](http://www.mass.gov/ig).

GPS/cgh  
Enclosure(s)

The Designer Selection Board receives a large number of questions from local authorities related to the adoption or application of designer selection procedures to various situations. The following questions and answers represent those issues that are most often raised by cities and towns. The Board hopes that the answers will provide you with either specific or general direction in your efforts to properly comply with the designer selection requirements.

**1. Is the employment of an educational programmer or planner considered a design service requiring public advertisement in accordance with approved designer selection guidelines?**

ANSWER: No, unless the scope of services originally contemplates or develops into an evaluation of an existing facility or a new facility to determine the feasibility and costs of renovation, and/or to determine the feasibility and costs of constructing an addition or new facility. Where the services include what is conventionally termed an “architectural” program, the designer selection procedures apply.

**2. Is there a minimum dollar threshold that must be exceeded before a formal designer selection procedure must be followed?**

ANSWER: The law requires that whenever the design fee is estimated to cost \$10,000 or more, or whenever the estimated construction cost of a project is \$100,000 or more and design services are required, a designer selection procedure must be followed.

**3. Is a feasibility study required prior to the employment of a designer to prepare development plans and specifications and/or construction documents?**

ANSWER: A study is not required on local building projects. However, it is highly recommended that a study be completed before designing any project of substantial magnitude. The advantage of obtaining a comprehensive evaluation of the existing facility and/or proposed scope of work including consideration of feasible alternatives and related estimated costs cannot be understated. Without the benefit of this basic information, hiring a designer to prepare final contract documents at a fixed limit cost of construction for a pre-designated lump sum design fee is seldom prudent.

**4. What is a reasonable fee to establish for the study, the design of construction documents and the administration of construction?**

ANSWER: Chapter 7, section 38G (c) states:

*“All fees shall be stated in designer’s contracts and in any subsequent amendment thereto as a total dollar amount. Contracts may provide for equitable adjustments in the event of changes in scope of services.”*

Common practice does allow the establishment of a ceiling amount in the designer’s contract often referred to as an “upset amount”, with actual payments being made for design services rendered on an hourly basis. This method of payment is normally used on “study projects” where the extent and difficulty of the work effort is unknown. The maximum hourly rate established on DCAM State projects is **2.75** times payroll costs not to exceed **\$125/hr.** The standard method of payment of a lump sum design contract is attached.

**5. Can the firm that completes the study also be employed to complete the design and administer the construction contract?**

ANSWER: Yes, the designer selection law permits municipalities to contract with the same designer for both the study and the subsequent design provided the following conditions are applied:

- a. Designers performing studies for repair work may be continued to provide design services, provided, first, that such work is limited to identifying and correcting existing deficiencies in a portion of a building or its equipment; and second, that the designer's fee for the combined study and design of repairs is not greater than one hundred thousand dollars.
- b. Awarding authorities in cities and towns may allow a designer who conducted a feasibility study to continue with the design of a project; but, nothing herein shall prohibit the awarding authorities from commissioning, at the discretion of the awarding authorities, an independent review, by a knowledgeable and competent individual or business doing such work, of the feasibility of the designer's work to insure its reasonableness and its adequacy before allowing the designer to continue on the project.

**6. Can cities and towns use donated services or in-house staff for design or/or construction?**

ANSWER: It appears that there are no legal restrictions against town employees or citizens from donating design services for public projects. Serious ramifications could develop, however, if any injury to an individual or property developed and that injury was due to errors or omissions in the design of the project. Furthermore, a design should not be permitted to "donate services" during an early stage of a project and then be continued by the awarding authority, on a fee basis, to a later stage of the design.

**7. Can a building project be subdivided into its component parts with provisions for donated time and materials to be combined with a general contractor's bid and construction of other major components?**

ANSWER: Although a public authority may accept donated time and materials, the administration and coordination of different building components, i.e., roofing, electrical, plumbing, heating, etc. should be coordinated by a professional architect or engineer possessing the experience and expertise of providing contract documents that are in conformance with the new Massachusetts State Building Code and also Mass. General Laws, Chapter 149, Section 44A to 44H, Section 44M, and Chapter 30, Section 39M, commonly known as the "bidding statutes". Dividing projects into smaller components, merely to avoid threshold limits that trigger enactment of competitive bidding statutes, is prohibited by law. Awarding authorities should proceed cautiously whenever a proposal is made to divide responsibilities for design and construction of a project by individual construction of building components on building projects.

**8. Can cities or towns request applicants for building projects to submit a fee proposal?**

ANSWER: While there are no express provisions in the designer statutes that prohibits cities and towns from receiving competitive fee proposals from designers proposing to perform services related to a building project, there is a specific procedure to follow when an awarding authority intends to negotiate a fee. An argument can be made that the receipt of competitive fee proposals, prior to evaluating applicants, is contrary to the statutory provisions governing both the criteria for selecting designers and the method for determining the appropriate amount of a design fee. The Ward Commissions Final Report concluded that the receipt of competitive fee proposals was not in the overall public interest. The Inspector General adopted the position that public agencies are prohibited from receiving competitive fee proposals from designers.

The statutes state that:

*“all fees must be stated in designer’s contracts and in any subsequent amendment thereto as a total dollar amount. Contracts may provide for equitable adjustments in the event of changes in scope of services.”*

The total dollar fee amount may be set by the awarding authority prior to the receipt of applications from interested designers, or it may be negotiated. Designers should be reviewed and ranked on the basis of qualifications not on the basis of the fee proposals.

If the public agency determines that the fee is to be negotiated, the awarding authority must first establish a maximum fee, which cannot be exceeded during negotiations. The awarding authority should then negotiate with the first ranked designer and if that negotiation fails then initiate negotiations with the second ranked designer and if again unsuccessful, proceed to the third ranked designer. The procedures as outlined in Mass. General Laws Chapter 7, 38G (b) should be followed, which provides in part:

*“The Commissioner (or Public Agency) may require a finalist with whom a fee is being negotiated to submit a fee proposal and include with it such information as the Commissioner (or Public Agency) requires to provide current cost and pricing data on the basis of which designer’s fee proposal may be evaluated.”*

The public agency remains under an obligation to attempt to negotiate a satisfactory design fee with the first ranked designer before proceeding to negotiate with the next highest ranked designer.

## Instructions for the Calculation of Designer Fees

Division of Capital Asset Management

May 2006

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The attached fee schedule, as shown in *Table I: Designers Base Fee as a Percentage of the FLCC by Building Type*, is to be used for the calculation of all designer fees, designer fee revisions, and lump sum fees negotiated with DCAM house doctors.

If, during design a change in fee is required (either an increase or decrease), the change should be based on a change in scope approved by the director, *not* a change in the FLCC.

The following are guidelines for establishing design fees for publicly funded building projects.

**1. Project FLCC:**

The Fixed Limit Construction Cost (FLCC) is:

- (a) listed in the DSB ad for the project, or
- (b) if a house doctor is used, is based on the FLCC listed in the certified study, or
- (c) as revised from a) or b) above and approved by the Director.

**2. Basic Design Fee:**

The basic design fee is calculated as a percentage of the fixed limit construction cost (FLCC) of the project. The appropriate percentage can be found in Table I by cross referencing the project complexity (Class I-V) and the FLCC. The exact amount of the fee may be adjusted by extrapolation between the FLCC's as listed.

If all or a major portion of the project involves major renovation of a building add 0.5% to the designer's fee. Building repairs should not be considered as renovation work. The Design Contract (DCAM C-2) defines the responsibilities of the designer.

**3. Additions to the Basic Design Fee**

- a.) Extra Compensation (defined by Article 11 of DCAM C-2 contract). These services are negotiated as needed and may include:
  - design fee for design and selection of Furniture and Equipment not included in the general construction contract. The Furniture and Equipment (F&E) amount should be based upon actual anticipated expenditures and not on a % of the FLCC.
  - preparation of measured drawings of existing facilities; additional analyses, etc.
  - designer services related to owner initiated change orders. This fee should be a percentage of the actual change order cost.
- b.) Reimbursable Costs (defined by Article 12). These include payments to the designer for the actual cost of special consultants (testing, environmental, etc.) not included in the design contract and for other actual costs not included under the designer's basic services and as approved by DCAM.

**4. Other adjustments:**

Special conditions may require an increase or decrease in the designer fee.

15% of the total fee for the approval of schematics.  
 30% of the total fee for approval of design development documents.  
 70% of the total fee for the approval of construction documents.  
 100% of the total fee upon final acceptance of the project.  
 The last 30% of the fee is distributed proportionately throughout the construction phase.

**Table I:** Designers Base Fee as a Percentage of the Fixed Limit *Construction Cost* (FLCC) by building type for New Construction. (See note below for instructions on calculating adjustment for Renovation projects)

		Building Types				
FLCC*		I	II	III	IV	V
	<i>From</i>					
	<i>to</i>					
	\$124,999	14.0%	11.7%	10.0%	8.0%	10.6%
\$125,000	\$312,499	12.8%	10.8%	9.2%	7.5%	9.3%
\$312,500	\$624,999	11.9%	10.1%	8.5%	7.0%	7.7%
\$625,000	\$1,249,999	11.3%	9.5%	8.0%	6.6%	7.2%
\$1,250,000	\$3,124,999	11.0%	9.2%	7.7%	6.3%	6.7%
\$3,125,000	\$6,249,999	9.5%	8.0%	6.6%	5.3%	6.2%
\$6,250,000	\$12,499,999	8.5%	7.2%	5.9%	4.7%	5.9%
\$12,500,000	\$31,249,999	8.0%	6.7%	5.7%	4.5%	5.6%
\$31,250,000	\$124,999,999	7.5%	6.5%	5.5%	4.5%	5.3%
\$125,000,000	or more	7.0%	6.0%	5.0%	4.0%	

\* Note: The Fixed Limit Construction Cost (FLCC) is the Estimated Construction Cost (ECC) as established in the project study adjusted to the projected mid point of construction.

*Add to Fee:*

- for Fixtures & Equipment (F&E) design and selection costs. (additional service)
- 0.5% for renovation projects

<b>GROUP I</b>	Projects of above average complexity as for example: courthouses, college building with special facilities, extended care facilities, hospitals, laboratories, specialized portions of correction facilities, and mental institutions.
<b>GROUP II</b>	Projects of average complexity for example: college classroom facilities, repetitive elements of correctional and detention facilities, dining halls (institutional), fire stations, gymnasiums, laundries and cleaning facilities, office buildings (for single occupancy), park, playgrounds and recreational facilities.
<b>GROUP III</b>	Projects of less than average complexity as for example: armories, apartments, dormitories, exhibition halls, skating rinks, and service garages.
<b>GROUP IV</b>	Utilitarian buildings as for example: parking structures and repetitive garages, simple loft-type structures (without special equipment), and warehouses.
<b>GROUP V</b>	Repairs/renovations of limited complexity involving primarily a single discipline (engineering or architecture), i.e. roofs, masonry repairs, window replacement, mechanical/electrical plumbing work, etc.